

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 8TH DAY OF JULY 2024 / 17TH ASHADHA, 1946

CRL.MC NO. 2924 OF 2015

CRIME NO.1123/2013 OF PATHANAMTHITTA POLICE STATION,

PATHANAMTHITTA

AGAINST THE ORDER/JUDGMENT DATED IN ST NO.2065 OF 2014 OF
JUDICIAL MAGISTRATE OF FIRST CLASS -I, PATHANAMTHITTA

PETITIONERS/ACCUSED NO.1 & 2:

- 1 PRADEEP
AGED 35 YEARS
S/O. CHELLAPPAN PILLAI, PRADEEP BHAVAN,
PARAMBUVAYALKAVU TEMPLE, NEDUMAN MURI, EZHAMKULAM.
- 2 PRASANTH
AGED 29 YEARS
S/O. SIVAN PILLAI, KUZHIPPILETHU VEEDU, NEAR
GURUMANDIRAM, VIZHIKKATHODU, KOOVAPPILLY, KOTTAYAM.
BY ADV. SRI.C.P.UDAYABHANU

RESPONDENTS/COMPLAINANT:

STATE OF KERALA

REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM-682031.

BY ADV.

SRI.M.P.PRASANTH, PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
08.07.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

' CR '

P.V.KUNHIKRISHNAN, J.

Crl.M.C. No. 2924 of 2015

Dated this the 08th day of July, 2024

O R D E R

In a democratic country, if there is no freedom of the press, that will be the end of democracy itself. People should be aware of what is true and what is untrue. Then only they can participate in the democratic process of electing a democratic government. Therefore, in a democratic country, the press plays a crucial role. 'The pen is mightier than the sword, because it has the power to change minds and shape the world', is written by the English author and playwright Edward Bulwer-Lytton in 1839 for his play 'Richelieu'. However, while using the pen, the media should exercise extreme caution as even a tiny error in reporting could have an impact on an

individual's privacy or the constitutional rights guaranteed to the populace.

2. This Criminal Miscellaneous Case is filed by the accused in ST.No.2065 of 2014 on the file of the Judicial First Class Magistrate Court-I, Pathanamthitta, arising from Crime No.1123 of 2013 of Pathanamthitta Police Station. The petitioners are the media persons attached to Reporter T.V. Channel.

3. The prosecution case is that the petitioners, who are arrayed as accused Nos. 1 & 2, entered the District Jail, Pathanamthitta, on 16.07.2013 at 4.20 p.m. with permission to visit an under trial prisoner by the name Joppan, who was an accused in Crime No.656 of 2013 of Konni Police Station registered for the offence punishable under Sections 420 r/w 34 IPC. During that visit, the accused attempted to record the statement of the detenu, Joppan, who is Charge Witness No.2 in the Final Report with their mobile phone device, violating the jail rules. The matter was

reported to the Station House Officer, Pathanamthitta by the Superintendent, District Jail, Pathanamthitta as evident by Annexure - II. Consequent to Annexure - II, Crime No.1123 of 2013 was registered by the Pathanamthitta police. After investigation, Final Report was filed against the petitioners alleging offences punishable under Sections 86 & 87 of the Kerala Prisons and Correctional Services (Management) Act 2010 (for short 'Act 2010'). Aggrieved by the above Final Report, this Criminal Miscellaneous case is filed.

4. Heard the learned counsel appearing for the petitioners and the learned Public Prosecutor.

5. It is an admitted fact that the petitioners were trying a 'sting operation' to get the statement of an accused in a sensational case at that time, which is popularly known as the 'solar scam case'. There are two questions to be decided in this case. The first is whether any offence is made out and the second is

whether the 'sting operation' conducted by the press people in this case amounts to an offence.

6. The first point to be decided is whether the offence under Sections 86 and 87 of Act 2010 is attracted in the facts and circumstances of this case. It will be better to extract Sections 86 and 87 of Act 2010:

"86. Punishment in certain cases.—(1)
Whoever, in contravention of any provisions of the Act, brings or removes or attempts by any means whatever to bring or remove, into or from any prison, or supplies or attempts to supply to any prisoner outside the limits of a prison, any prohibited article, and any officer or member of staff of a prison who, contrary to any rule, knowingly suffers any such article to be brought into or removed from any prison, to be possessed by any prisoner, or to be supplied to any prisoner outside the limits of a prison, and whoever, contrary to any rule, communicates or attempts to communicate with any prisoner, and whoever abets any offence made punishable by this section, shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding twelve months, or to fine not exceeding ten thousand rupees or with both.

(2) Whoever, being a prisoner or a visitor, or a

prison official, is found in possession of an electronic communication or other equipment inside the prison against the provisions of the Act or rules, or found to be manipulating, damaging or destroying any equipment, electronic or otherwise, in the prison, shall on conviction, before a Magistrate, be liable to imprisonment for a term not exceeding two years or fine not exceeding ten thousand rupees or with both.

(3) The offences mentioned in sub-sections (1) and (2) above, shall be cognizable and non-bailable.

87. Power to arrest for offence under section 86.—When any person, commits any offence specified in section 86, any officer of the prison may arrest him, and shall without delay make him over, with a report, to the Station House Officer who is having jurisdiction over the area and thereupon such police officer shall proceed as if the offence had been committed in his presence:

Provided that when the person committing the offence is a prisoner or a prison official, a report need only be presented before the Station House Officer.”

7. To attract Section 86, certain ingredients are necessary. A person in contravention of the Act, brings or removes or attempts by any means whatever to bring or remove, into or from any prison, or supplies

or attempts to supply to any prisoner outside the limits of a prison, any prohibited article, and any officer or member of staff of a prison who, contrary to any rule, knowingly suffers any such article to be brought into or removed from any prison, to be possessed by any prisoner, or to be supplied to any prisoner outside the limits of a prison, and whoever, contrary to any rule, communicates or attempts to communicate with any prisoner, and whoever abets any offence made punishable by this section, shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding twelve months, or to fine not exceeding ten thousand rupees or with both. Clause 86(2) says that whoever, being a prisoner or a visitor, or a prison official, is found in possession of an electronic communication or other equipment inside the prison against the provisions of the Act or rules, or found to be manipulating, damaging or destroying any equipment, electronic or

otherwise, in the prison, shall on conviction, before a Magistrate, be liable to imprisonment for a term not exceeding two years or fine not exceeding ten thousand rupees or with both. Clause 87 says that, when any person, commits any offence specified in section 86, any officer of the prison may arrest him, and shall without delay make him over, with a report, to the Station House Officer who is having jurisdiction over the area and thereupon such police officer shall proceed as if the offence had been committed in his presence.

8. A reading of the above provisions and Annexure - II report from the Superintendent of District Jail, Pathanamthitta, it cannot be said that the ingredients of Section 86 of Act 2010 are not attracted. The prosecution case is that, the petitioners tried to record the conversation with a prisoner from inside the jail and it was detected by the officer concerned. Therefore, *prima facie*, the ingredients of

the offence under Section 86 of Act 2010 is there.

9. The next question to be decided is whether the petitioners, being media persons, are entitled to any exemption from prosecution.

10. The press is known as the 'fourth estate'. It is also known as 'fourth pillar' in a democratic society. The origin of the term 'fourth estate' is attributed to Edmund Burke, an Anglo-Irish politician, who said to have used it in a British Parliamentary debate in 1771. The 'fourth estate' and 'fourth pillar' refers to the media, or press, which plays a crucial role in democracy. The fourth estate is holding those in power accountable by investigating and exposing corruption, abuse of power, and wrongdoing. They provide a platform for diverse perspectives giving way to various opinions, views and interests. The fourth estate informs the public by reporting accurate and unbiased information enabling them to make informed decisions. The fourth estate is acting as a watchdog

overseeing government actions, policies and decisions. The fourth estate is also facilitating public debates and discussions and encouraging dialogue and scrutiny of important issues. The fourth estate is supporting transparency and accountability, shedding light on government activities, and promoting openness and good governance. The fourth estate is also empowering the citizens by providing information enabling them to participate actively in the democratic process. In summary, the fourth estate is essential to a healthy democracy, ensuring that power is not abused and that the citizens are well informed and engaged in the democratic process.

11. Whether the fourth estate is functioning and following the above principles is a different thing. But to attain the above goals, there may be some activities from their side which is normally not permitted as per law. One of such method used by the fourth estate is 'sting operation'. Whether the

'sting operation' by media persons can be legalised was considered by the Apex Court in several decisions. In **R.K. Anand and Another v. Registrar, Delhi High Court** [2009 KHC 863], the Apex Court observed that a sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment. It will be better to extract the relevant portion of the above judgment:

"173. Reporting of pending trial: We are also unable to agree with the submission made by Mr. P. P. Rao that the TV channel should have carried out the stings only after obtaining the permission of the Trial Court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the Court before its telecast. Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the Court. On little consideration the idea appears to be quite repugnant both from the points of view of the Court and the media. It would be a sad day for the Court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the

Court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the Court would tantamount to pre-censorship of reporting of Court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Art.19(1) of the Constitution. This is, however, not to say that media is free to publish any kind of report concerning a sub-judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub-judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment."

[underline supplied]

12. In the above decision, in paragraph 179, the Apex Court observed that, the sting telecast by NDTV was indeed in larger public interest and it served an important public cause.

13. In **Rajat Prasad v. CBI** [2014 KHC 4299], the Apex Court considered the decision in **R.K. Anand's** case (supra) again. It will be better to extract the relevant portion of the above judgment:

“11. Unlike the U.S. and certain other countries where a sting operation is recognized as a legal method of law enforcement, though in a limited manner as will be noticed hereinafter, the same is not the position in India which makes the issues arising in the present case somewhat unique. A sting operation carried out in public interest has had the approval of this Court in R. K. Anand v. Registrar, Delhi High Court, 2009 KHC 863 : 2009 (8) SCC 106 : 2009 (10) SCALE 164 though it will be difficult to understand the ratio in the said case as an approval of such a method as an acceptable principle of law enforcement valid in all cases. Even in countries like the United States of America where sting operations are used by law enforcement agencies to apprehend suspected offenders involved in different offences like drug trafficking, political and judicial corruption, prostitution, property theft, traffic violations etc., the criminal jurisprudence differentiates between "the trap for the unwary innocent and the trap for the unwary criminal" (per Chief Justice Warren in *Sherman v. United States*, 356 US 359 (1958) approving situations where government agents

"merely afford opportunities or facilities for the commission of the offense" and censuring situations where the crime is the "product of the creative activity" of law - enforcement officials (Sorrell v. United States, 287 US 435 (1932)). In the latter type of cases the defence of entrapment is recognised as a valid defence in the USA. If properly founded such a defence could defeat the prosecution.

14. Thus, sting operations conducted by the law enforcement agencies themselves in the above jurisdictions have not been recognised as absolute principles of crime detection and proof of criminal acts. Such operations by the enforcement agencies are yet to be experimented and tested in India and legal acceptance thereof by our legal system is yet to be answered. Nonetheless, the question that arises in the present case is what would be the position of such operations if conducted not by a State agency but by a private individual and the liability, not of the principal offender honey trapped into committing the crime, but that of the sting operator who had stained his own hands while entrapping what he considers to be the main crime and the main offender. Should such an individual i.e. the sting operator be held to be criminally liable for commission of the offence that is inherent and inseparable from the process by which commission of another offence is sought to be established? Should the commission of the first offence be understood to be obliterated and

extinguished in the face of claims of larger public interest that the sting operator seeks to make, namely, to expose the main offender of a serious crime injurious to public interest? Can the commission of the initial offence by the sting operator be understood to be without any criminal intent and only to facilitate the commission of the other offence by the "main culprit" and its exposure before the public? These are some of the ancillary questions that arise for our answer in the present appeals and that too at the threshold of the prosecution i.e. before the commencement of the trial.

15. The answer to the above, in our considered view would depend, as in any criminal case, on the facts and circumstances thereof. A crime does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Any such principle would be abhorrent to our criminal jurisprudence. At the same time the criminal intent behind the commission of the act which is alleged to have occasioned the crime will have to be established before the liability of the person charged with the commission of crime can be adjudged. The doctrine of mens rea, though a salient feature of the Indian criminal justice system, finds expression in different statutory provisions requiring proof of either intention or knowledge on the part of the accused. Such proof is to be gathered from the surrounding facts established by the evidence and materials before the

Court and not by a process of probe of the mental state of the accused which the law does not contemplate. The offence of abetment defined by S.107 of the IPC or the offence of criminal conspiracy under S.120A of IPC would, thus, require criminal intent on the part of the offender like any other offence. Both the offences would require existence of a culpable mental state which is a matter of proof from the surrounding facts established by the materials on record. Therefore, whether the commission of offence under S.12 of the PC Act read with S.120B IPC had been occasioned by the acts attributed to the accused appellants or not, ideally, is a matter that can be determined only after the evidence in the case is recorded. What the accused appellants assert is that in view of the fact that the sting operation was a journalistic exercise, no criminal intent can be imputed to the participants therein. Whether the operation was really such an exercise and the giving of bribe to A1 was a mere sham or pretence or whether the giving of the bribe was with expectation of favours in connection with mining projects, are questions that can only be answered by the evidence of the parties which is yet to come. Such facts cannot be a matter of an assumption. Why in the present case there was a long gap (nearly 12 days) between the operation and the circulation thereof to the public is another relevant facet of the case that would require

examination. The inherent possibilities of abuse of the operation as videographed, namely, retention and use thereof to ensure delivery of the favours assured by the receiver of the bribe has to be excluded before liability can be attributed or excluded. This can happen only after the evidence of witnesses is recorded. Also, merely because in the charge - sheet it is stated that the accused had undertaken the operation to gain political mileage cannot undermine the importance of proof of the aforesaid facts to draw permissible conclusions on basis thereof as regards the criminal intent of the accused in the present case."

[underline supplied]

14. In the above judgment, the Apex Court observed that a 'sting operation' carried out in public interest has had the approval of the Court. But it is not the rule that, anybody can do 'sting operation' and escape from the legal consequences, if any, by saying that it was for the public interest. If such a view is taken, it will be a society where there is no law and order. But 'sting operation' by law enforcement agency and recognised media people is to be viewed in a

different angle. But, there cannot be any uniform rule that all 'sting operation' conducted by the law enforcement agency and media is to be legalised. It is to be decided based on the facts in each case. If the sting operation is done by the press with any *mala fide* intention or to target a person individually and to humiliate him, there will not be any backing of law to the media person for such sting operation and the reporting based on such 'sting operation'. But if the 'sting operation' is to find out the truth and to convey the same to the citizen, without any malafide intention, the press is exempted from prosecution for such 'sting operation'. But the press should act with *bonafides* and their aim should be only to promote the democracy and their intention should be to find out the truth and not to harass or humiliate any person or any section of people or the government. The Apex Court in **State of Kerala v. Malayala Manorama** [1994 KHC 205] observed about the freedom of press

in detail. The relevant portion is extracted hereunder:

"13. Freedom of press has always been a cherished right in all democratic countries, the newspapers not only purvey news but also ideas, opinions and ideologies besides much else. They are supposed to guard public interest by bringing to force the misdeeds, failings and lapses of the Government and other bodies exercising governing power. Rightly, therefore, it has been described as the Fourth Estate. The democratic credentials of a State is judged today by the extent of freedom the press enjoys in that State. According to Douglas, J. (An Almanac of Liberty) "acceptance by Government of a dissident press is a measure of the maturity of the nation". The learned Judge observed in *Terminiello v. Chicago* [1949] 93 L.Ed. 113]: "A function of free speech under our system of Government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices, and preconception and have profound unsettling effects as it presses for acceptance of an idea There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardisation of ideas either by Legislatures, courts or dominant political or community groups". The said observations were of course made with reference to the 1st Amendment to

the U.S. Constitution which express guarantees freedom of press but they are no less relevant in the Indian context subject, of course, to clause (2) of Art.19 of our Constitution. We may be pardoned for quoting another passage from Hughes, C. J. in *De Jonge v. State of Oregon* (1937) 299 US 353 to emphasise the fundamental significance of free speech. The learned Chief Justice said: "greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that Government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic the very foundation of the Constitutional Government"."

[underline supplied]

15. Therefore, the freedom of the press may not include the 'sting operation' in all situations. Whether a 'sting operation' was to find out the truth and to communicate the same to the citizen has to be decided based on the facts of each case and of course it will be scrutinized by the judiciary. Therefore, the

media persons should be vigilant while conducting 'sting operations'.

16. Coming back to the present case, the petitioners admittedly entered the district jail premises with prior permission. The petitioners were trying to get the statement of a prisoner who was involved in a very sensational case during that period. Every day, news was coming about the above case at that time. Because of an over enthusiasm to get the statement of a prisoner, the petitioners used a mobile phone. This was detected by the prison officers as evident by Annexure - II and refrained them from using the mobile phone. Therefore no recording was effected because of the interference of the jail authorities. In such circumstances, I am of the considered opinion that the continuation of the prosecution against the petitioners, who are admittedly media persons is not necessary. The act of the petitioners was only with an intention to get news

and there is no intentional act to violate the law.

Therefore, this Criminal Miscellaneous Case is allowed. All further proceedings as against the petitioners in S.T.No.2065/2014 pending before the Judicial First Class Magistrate Court - I, Pathanamthitta arising from Crime No.1123/2013 of Pathanamthitta Police Station are quashed.

**Sd/-
P.V.KUNHIKRISHNAN
JUDGE**

APPENDIX OF CRL.MC 2924/2015

PETITIONER ANNEXURES

ANNEXURE I- THE CERTIFIED COPY OF THE FINAL REPORT IN CRIME NO. 1123/13 OF PATHANAMTHITTA POLICE STATION PENDING AS ST. 2065/14 ON THE FILE OF THE JFCM COURT, PATHANAMTHITTA.

ANNEXURE II- A COPY OF THE REPORT FILED BY THE 1ST INFORMANT TO THE RESPONDENT.

RESPONDENTS EXHIBITS: NIL

//TRUE COPY//

PA TO JUDGE